STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE SLUCHAK,

Defendant-Appellant.

UNPUBLISHED
October 26, 2006

No. 262674
Emmet Circuit Court
LC No. 04-002275-FC

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). Defendant's convictions were based on alleged multiple incidents of sexually motivated touching and penetration of his step-granddaughter, over a period of six years, starting when she was in first grade and ending when she was 12 years old. Defendant was sentenced to concurrent prison terms of 25 to 40 years for the CSC I convictions and 10 to 15 years' imprisonment on the CSC II convictions. We affirm.

Defendant first argues that the trial court erred when it allowed the admission of other acts evidence relative to the victim despite the failure of the prosecutor to comply with the notice requirement set forth in MRE 404(b)(2). Defendant claims that the notice submitted by the prosecutor was deficient because the victim was not listed as a potential witness on the notice. We first note that the notice indicated that it was not limited to the witnesses listed therein. Also, MRE 404(b)(2) contains no language requiring the prosecutor to give notice of the names of witnesses with respect to other acts evidence. Rather, MRE 404(b)(2) provides:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence.

Here, the prosecutor provided notice of the general nature of the evidence at issue and the rationale for admission. The notice provided that the other acts evidence would entail acts in which defendant controlled and derived sexual pleasure from children (motive), acts that placed

defendant in close proximity and gave him access to young female relatives (opportunity), acts where defendant obtained sexual pleasure from contact with children (intent), acts in which defendant found children and coerced them into sexual activity by his position and authority (common scheme, plan, or system), and acts that showed the absence of mistake, considering defendant's claims of inadvertent tickling encounters. This notice was sufficient for purposes of MRE 404(b)(2). Accordingly, there was no error by the trial court in finding compliance with MRE 404(b)(2), and there is no merit to defendant's accompanying argument that the prosecutor engaged in misconduct by intentionally providing inadequate notice. Moreover, assuming inadequate notice, reversal is unwarranted where the evidence was admissible, and where there is no indication that defendant would have handled the case any differently had proper notice been given. *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

Defendant next claims that the trial court erred in excluding evidence of the victim's parents' civil lawsuit against defendant. The trial court found the evidence to be minimally probative of witness bias and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to defendant. See MRE 401-403; *People v Sabin (After Remand)*, 463 Mich 43, 58-59; 614 NW2d 888 (2000). Somewhat problematic in the trial court's analysis is the fact that defendant sought admission of the evidence and was willing to accept any prejudice he might incur through its admission. The prosecutor and the trial court were of the opinion that admitting the evidence in a fair manner would necessarily require reference to a nolo contendere plea, later withdrawn, that preceded the filing of the civil lawsuit, and that evidence of the plea and its withdrawal was unfairly prejudicial to defendant. But defendant made clear his desire to have the evidence admitted regardless whether the jury also heard of the plea.[1] We find it unnecessary to determine whether the trial court erred in excluding the evidence because, assuming error, it was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 491-497; 596 NW2d 607 (1999). Considering that defendant was prepared to agree to the admission of evidence regarding the plea and its withdrawal along with the evidence of the lawsuit, the evidence would have been damaging overall to defendant in all likelihood. Even if evidence of the lawsuit was admitted without reference to the plea, it is not more probable than not that a different outcome would have resulted given the strength of the prosecution's case. Reversal is unwarranted.

Defendant next argues that the trial court erred when it admitted photographs of the victim as a young child that had little probative value and were highly prejudicial. On the issue of relevance, which formed the basis for defendant's objection at trial, we are not prepared to hold that the trial court abused its discretion in finding the evidence relevant. *Lukity*, *supra* at 488. On the issue of whether MRE 403 precluded admission, which was not raised below, we conclude that defendant has failed to establish plain error affecting his substantial rights, nor that, assuming error, the error resulted in the conviction of an actually innocent defendant or seriously

[1] We note that evidence of a plea is generally inadmissible "against the defendant" under MRE 410. It would appear that a defendant himself or herself could waive protection from the rule, but it is unnecessary to examine this matter any further in light of our resolution of this issue. We also note that defendant did not demand protection under MRE 410 while arguing for admission of evidence regarding the civil suit.

affected the fairness, integrity, or reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The photographs were merely two pictures of the victim during the timeframe when the sexual assaults occurred. Reversal is unwarranted.

We next reject defendant's argument of cumulative evidentiary error because, given our rulings above, we find no showing of cumulative errors that resulted in substantial prejudice and denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Finally, defendant argues that the trial court erred in departing upward from the sentencing guidelines. We disagree.

The verdict form indicates that the jury found defendant guilty of three counts of CSC I and two counts of CSC II and that defendant committed these acts in 1995, 1997, and 1998. Accordingly, and as recognized by the trial court, the judicial sentencing guidelines, as opposed to the statutory guidelines, are applicable. MCL 769.34(1) (judicial sentencing guidelines do not apply to felonies committed on or after January 1, 1999). In *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001), our Supreme Court explained the nature of the judicial sentencing guidelines:

> This Court's sentencing guidelines were "mandatory" only in the sense that the sentencing court was obliged to follow the procedure of "scoring" a case on the basis of the circumstances of the offense and the offender, and articulate the basis for any departure from the recommended sentence range yielded by this scoring. However, because the recommended ranges found in the judicial guidelines were not the product of legislative action, a sentencing judge was not necessarily obliged to impose a sentence within those ranges. [Citations omitted.]

We review the sentencing departure for an abuse of discretion. *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000). A trial court abuses its discretion when the court imposes a sentence that violates the principle of proportionality, which occurs when the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *Bennett*, *supra* at 515. A sentencing court may deviate from the judicial sentencing guidelines when the range is disproportionate to the seriousness of the crime and a defendant's prior record. *Milbourn*, *supra* at 636.

Here, the trial court articulated its reasons for departing from the sentencing guidelines, with the overriding premise being that the guidelines were inadequate where defendant sexually assaulted the victim and another grandchild repeatedly over many years, along with engaging in a sexually deviant act with a girl who lived next door. The evidence indicates that while defendant was charged with only five counts of CSC against the victim, the child was subject to depraved acts of sexual molestation by defendant on more than 30 occasions over a six-year period. The record also bears out that defendant sexually molested the other children. It is evident that defendant is a predatory pedophile who took advantage of any opportunity to sexually prey on his grandchildren and others. The sentencing departure did not constitute an abuse of discretion as the sentence was proportionate to the seriousness of the circumstances surrounding the offense and the offender.

The trial court's offhanded remark concerning defendant's claim of innocence does not alter our ruling because it was not made in the context of the court's articulation of reasons for departure. Additionally, the trial court's reference to defendant's lack of remorse does not call for resentencing. Again, the thrust of the court's reasoning for departing from the guidelines was the evidence of defendant's extensive history of sexually assaulting the victim and others. And "[a] sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals." *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Therefore, all of the uncharged incidents with the victim, the incidents with defendant's other granddaughter, and the incident regarding defendant's neighbor girl were all validly considered by the trial court.[2] This negates defendant's argument that the guidelines adequately measured his prior offenses because there were only four incidents and he was scored for three, because between all three girls, there were dozens of uncharged incidents. This also negates defendant's quibble that the trial court's reference to "multiple" victims was inappropriate because "multiple" somehow implies more than two. Even if that were so, there were three different victims validly considered at sentencing, so the statement was accurate by any reasonable definition of "multiple."

Additionally, the trial court more than adequately explained the small weight it gave to the expressions of support defendant received from friends in the community by its observation that "child molesters always conduct their sick and perverted activities in private" because "[t]he child molester who openly advertised his perverse ways would not be successful." The trial court said that "this explains the observations of those who do not understand this defendant's criminal conduct and were surprised that he is involved in it." Furthermore, we find no basis for resentencing because of the trial court's accurate observations that defendant failed to cooperate with his attorney and the probation department relative to sentencing.

Finally, we reject defendant's claim that it was a constitutional violation for the trial court to exceed the guidelines based on facts that were not found to be established beyond a reasonable doubt by a jury. Such a right only applies to increases in a maximum sentence, not for a sentence that, while exceeding the guidelines, is within the statutory maximum. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski

[2] Defendant's argument that his act of having the girl from the neighborhood shave just the top part of his genitalia was not for sexual purposes is ludicrous.